ance of the bad lease should constitute a surrender of the good one), the courts refused to do so and denied a surrender.[10] Of course in both these cases the same result might be reached on some doctrine of estoppel.[11] But it is submitted that the above reasoning is more conclusive and has the added merit of explaining apparently inconsistent authorities in other cases. Where the lessor with the consent of the original lessee gives a new void lease to a third party who takes possession and pays rent there will be no surrender,[12] although if the lease had been good it would have been otherwise.[13] Yet the case clearly falls within the doctrine of estoppel, for the change of possession consented to by all the parties is an act entirely inconsistent with the existence of the original tenancy. Nor is there any sound distinction between that and the case of an assignment of the lease with the consent of the landlord and followed by a change of possession, as in the principal case. In the one case the tenancy was created by a new lease directly from the landlord, while in the other, by the assignment of the old lease with the consent of the landlord to hold the assignee as his tenant. So if the assignment is good there will be a surrender.[14] But if void it would follow that there should be none, if we look at the intent of the parties, although all the parties are as much estopped as if the new lease had come directly from the landlord. The principal case in denying a surrender would therefore seem to be merely carrying the theory of surrender as based on apparent intent to its logical conclusion, and may mark the collapse of estoppel as the alleged basis of surrenders by operation of law.

RESCISSION WITHOUT PUTTING DEFENDANT IN *STATU QUO*. — Upon the rescission of a contract induced by fraud, a recent New Hampshire case held that the plaintiff might recover a part of what he had given to the defendant without at the same time restoring the consideration he himself had received. *Page Belting Co.* v. *F. H. Prince & Co.*, 91 Atl.

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[10] Davison d. Bromley *v.* Stanley, *supra*; Roe d. Berkeley *v.* Archbishop of York, 6 East 86; See Wilson *v.* Sewell, *supra*, p. 1980; Van Rensselaer's Heirs *v.* Penniman, *supra*, p. 579; Knight *v.* Williams, [1901] 1 Ch. 256, 257; VIN'S. ABRIDG., tit. "Surrender," f. (7); BROWN, STATUTE OF FRAUDS, 5 ed., § 49.

[11] For if the tenant accepts a new lease, there is a representation that the landlord has the power to give it; hence he is estopped to set up its invalidity due to the existence of the original lease. Stern *v.* Thayer, *supra*, p. 96; Welcome *v.* Hess, *supra*, p. 512. But if the second lease is void, it would seem that there being no change of possession or other acts inconsistent with the continuance of the original lease, there can be no estoppel, and the original lease stands.

[12] Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400. See BROWN, STATUTE OF FRAUDS, 5 ed., § 54. Where the new tenant is *cestui que trust* of the original tenant it has been held that there is no surrender. Zick *v.* London United Tramways, Limited, [1908] 2 K. B. 126. Moreover, if there is fraud in giving the new lease, there is no surrender of the old one. Bruce *v.* Ruler, 2 M. & R. 3.

[13] Nickells *v.* Atherstone, 10 Q. B. 944; Davison *v.* Gent, 1 H. & N. 744; Drew *v.* Billings-Drew Co., 132 Mich. 65, 92 N. W. 774; Morgen *v.* McCollister, 110 Ala. 319, 20 So. 54; Whitney *v.* Meyers, 1 Duer (N. Y.) 266.

[14] Thomas *v.* Cook, 2 B. & A. 119; Wallace *v.* Kennelly, 47 N. J. L. 242; Bowen *v.* Haskell, 53 Minn. 480.

961 (N. H.).[1] The case may at first appear extremely startling, for it would seem to disregard at the same time two propositions: *viz.*, that a contract cannot be rescinded in part and affirmed in part and also that in rescission the defendant must be placed in *statu quo*. But the result in fact, instead of being purely arbitrary, shows a thoughtful and correct application of the principles underlying this class of cases.

Restitution throughout the law is based on the equitable principle forbidding unjust enrichment.[2] Quasi-contractual rights as well as restitution in equity are accordingly really of an equitable nature, although the remedy is furnished by courts of law which have acquired their jurisdiction under the fiction of an implied promise.[3] The rights being of this character, the remedies necessarily partake of it also and hence if a plaintiff demands such equitable relief from the court, it is proper that he himself should do equity. Consequently, as it has often occurred that a plaintiff who demanded restitution had himself received some consideration from the defendant, he has been required, lest he be unjustly enriched at the defendant's expense, to do equity by restoring it, that is, to put the defendant in *statu quo*.[4] But where the court could reach a proper result without this, it did not hesitate to do so, as where the consideration received by the plaintiff was valueless,[5] or, if it was such that could not be returned in specie, unjust enrichment could be prevented by setting off its money value against recovery from the defendant.[6]

The principal case would seem to be one where it is unnecessary to put the defendant in *statu quo*. The defendant had sold bonds to the plaintiff for a consideration, paid partly in stock and partly in cash. The bonds were of less value than represented, as the plaintiff was forced to realize on them without collecting a large amount of interest. The plaintiff sought to regain merely the stock and the accrued dividends. In order to do equity himself, should he have been required to restore the value of the bonds and demand as well the return of his money payment with interest? The facts of this case show that the cash plus interest in the hands of the defendant is alone equal to or in excess of the proceeds of the bonds retained by the plaintiff. So if the defendant is solvent, the result is equitably the same if the stock alone is regained, and the money claims balanced off, which method avoids the cumbersome process of restoring money to the defendant and immediately bringing action for the same or a greater amount. Such an analysis shows therefore that in substance the whole transaction is rescinded and not merely a part of it, and while the defendant has not been put in *statu quo* in form, still an equitable result has been reached. But in the principal case the defendant was insolvent. Certainly the plaintiff's duty

[1] The parties were contesting claimants in an interpleader suit, but for convenience in discussion we have thus simplified the facts. For a more complete statement, see this issue of the REVIEW, p. 333.

[2] KEENER, QUASI-CONTRACTS, pp. 16, 19; WOODWARD, QUASI-CONTRACTS, §§ 7–9.

[3] KEENER, QUASI-CONTRACTS, p. 14; WOODWARD, QUASI-CONTRACTS, § 2.

[4] KEENER, QUASI-CONTRACTS, p. 302; WOODWARD, QUASI-CONTRACTS, § 23; Coolidge *v.* Brigham, 1 Metc. (Mass.) 547.

[5] Kent *v.* Bornstein, 12 Allen (Mass.) 342; Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717.

[6] Todd *v.* Leach, 100 Ga. 227, 28 S. E. 43; Richards *v.* Allen, 17 Me. 296; Day *v.* New York Central R. Co., 51 N. Y. 583.

to restore is equitably only concurrent with the defendant's duty to repay, and as here the defendant cannot do so in full, the plaintiff acts fairly if he retains what he has. Nor can the defendant's creditors complain of this arrangement. The plaintiff's money is not and, as we have submitted, ought not to become part of the defendant's estate, and so the demand that the latter be put in *statu quo* would remit the plaintiff to his claim for a dividend and gives the creditors an undue advantage at his expense.

Because the requirement that the defendant be put in *statu quo* was a method of reaching a just result in the majority of cases, the idea became to some extent prevalent, that it was always necessary.[7] Many courts, however, more recently have recognized the underlying equitable principle and have refused to be governed by any wooden rule regardless of the circumstances. Mere failure to replace the defendant in *statu quo* without more will not be a bar where the plaintiff gets no undue advantage by this failure,[8] and where circumstances allow it, courts have been willing to set off corresponding claims when justice would be done and needless routine avoided.[9] Thus the result reached by the New Hampshire court, being the one most conformable with the merits of the case, is entirely commendable.

RECENT CASES

ALIENS — STATUS OF ALIEN ENEMIES IN THE COURTS OF A BELLIGERENT. — In an action for personal injuries it appeared that the plaintiff was an alien enemy. The plaintiff was still resident in Canada by permission of certain Orders in Council. *Held*, that the plaintiff can recover. *Topay* v. *Crow's Nest Pass Coal Co.*, 29 West. L. R. 555 (B. C.).

In an action on an insurance policy it appeared that the defendant was an alien enemy. *Held*, that the plaintiff can recover. *Robinson & Co.* v. *Continental Insurance Co.*, 31 T. L. R. 20 (K. B. Div.).

For a discussion of the status of an alien enemy in the courts of a belligerent, see NOTES, p. 312.

BANKRUPTCY — PREFERENCES — EFFECT OF RE-TRANSFER TO DEBTOR BEFORE PETITION. — A preferred creditor surrendered his preference to the debtor gratuitously and in good faith before the petition in bankruptcy was filed. The property thus surrendered was wasted by the debtor and never reached the hands of the trustee. In a suit by the trustee to recover the value of this preference, the creditor pleads the surrender. *Held*, that the plea states a good defense. *Lucey* v. *Matteson*, 32 Am. B. R. 782 (Dist. Ct., N. D., N. Y.).

After adjudication a creditor should surrender his preference to the trustee and not to the bankrupt. *In re Currier*, Fed. Cas., No. 3,492. Between the filing of the petition and adjudication, a creditor making a surrender to the

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[7] Hunt *v.* Silk, 5 East 449; see Thayer *v.* Turner, 8 Metc. (Mass.) 550, 552; Beed *v.* Blandford, 2 Y. & J. 278, 283.

[8] Basye *v.* Paola Refining Co., 79 Kan. 755, 101 Pac. 658; Creveling *v.* Banta, 138 Ia. 47, 115 N. W. 598.

[9] Sloane *v.* Shiffer, 156 Pa. 59, 27 Atl. 67; Farwell *v.* Hilton, 84 Fed. 293. See 12 HARV. L. REV. 65.